1679

IN THE

Supreme Court of the United States.

No. 1086. October Term, 1882.

ALBERT GRANT, Appellant,

vs.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, Appellee.

MOTION TO DISMISS APPEAL, AND BRIEF THEREON.

W. F. MATTINGLY,
R. T. MERRICK,
Solicitors for Appellee.

Thomas McGill & Co., Law Printers, Washington, D. C.

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PHŒNIX MUTUAL LIFE INSURANCE CO., APPELLEE. } No. 1086.

And now comes into court said appellee, by Wm. F. Mattingly and Richard T. Merrick, its solicitors, appearing specially for that purpose, and moves the court to dismiss the appeal of said Albert Grant to this court from said decree of March 2, 1882, passed by the court below, for want of jurisdiction in this court to hear the same; for the reason that said decree appealed from is not a final decree.

WM. F. MATTINGLY,
R. T. MERRICK,
Solicitors for Appellee.

Brief of Appellee upon Motion to Dismiss for Want of Jurisdiction.

The bill in this cause was filed in the court below by the Insurance Company to foreclose a number of deeds of trust upon certain real estate securing obligations of the appellant, Albert Grant, held by the complainant.

The defendant below, Albert Grant, filed a cross-bill setting up a certain alleged agreement between the Insurance Company and himself, under which the company, under certain restrictions, was to take a conveyance of the property and cancel and surrender Grant's obligations.

The decree sought to be appealed from was passed by the court below on March 2, 1882. In that decree the court, after expressing the opinion it had formed as to the rights of the parties, referred the cause to the auditor of the court to state the account between the Insurance Company and Grant, the amount due under the several deeds of trust, whether certain judgments against Grant were liens upon the property, and as to arrears of taxes and tax sales, &c. It also appointed a receiver to take possession of the property.

It did not decree a sale, nor the payment of any money, nor the delivery of any property to the complainant, but simply expressed its opinion upon the equities between the parties, and referred the cause to its auditor for information upon which it might hereafter make a final decree. The decree is clearly, under all the decisions of this court, interlocutory upon its face, and not final.

6 How., 201, Forgay *v.* Conrad,

Is the leading case upon this question. In that case the decree declared sundry deeds to be fraudulent and void; directed the real and personal property to be delivered to the complainant; decreed that one of the defendants should pay the complainant $11,000, and awarded him execution "for the several matters aforesaid." The decree then directed an account to be taken of the profits of the property ordered to be delivered up. This court, in holding the decree to be final, says:

"When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the de-

fendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried into immediate execution, the decree must be regarded as final to that extent and authorizes an appeal to this court, although so much of the bill is retained as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed.

"This rule, of course, does not extend to cases where money is directed to be paid into court, or property to be delivered to a receiver.

"Cases no doubt sometimes arise when the purposes of justice require that the property in controversy should be placed in the hands of a receiver, or a trustee be changed, or money be paid into court.

"In the case before us, for example, it would certainly have been proper and entirely consistent with chancery practice for the Circuit Court to have announced, in an interlocutory order or decree, the opinion it had formed as to the rights of the parties, and the decree it would finally pronounce upon the titles and conveyances in contest."

The court, in conclusion, enjoins upon the Circuit Courts to have decrees so prepared that the whole matter can be brought up and decided in one appeal.

The decree in the case at bar was prepared with a view to meet the requirements of the court as announced in the above cited case, and in order that all matters in controversy in this cause should be decided by this court, if necessary, on but one appeal to be taken from the final decree to be rendered after the coming in of the auditor's report.

6 How., 206, Perkins *v.* Fourniquet.

A decree that a community of acquests and gains existed between husband and wife, and ordering an account to be taken, is not final.

6 How., 209, Pulliam *v.* Christian.

A decree setting aside a deed and ordering the property

to be delivered to a commissioner, who was to take an account and report all matters necessary for a final decree, is not final.

7 How., 650, Barnard *v.* Gibson.

A decree for a perpetual injunction in a patent cause, and a reference to a master to take an account of profits, is not final.

18 How., 200, Craighead *v.* Wilson.

A decree settling the equities of the bill and referring the cause to a master to state the amount to be distributed amongst the parties, was held not to be final.

19 How., 283, Beebe *v.* Russell.

In this case the bill prayed that the defendants be ordered to convey to the complainant certain pieces of property fraudulently withheld from him, and account for the rents and profits. The Circuit Court decreed that the defendants should execute certain conveyances, surrender possession, and referred the cause to a master with certain instructions to take an account of the rents and profits. On appeal this court held that the decree was not final.

23 Wall., R. R. Co. *v.* Swasey.

A decree of foreclosure and sale is not final, in the sense which allows an appeal from it, so long as the amount due upon the debt must be determined, and the property to be sold ascertained and defined. The decree in this case went much further than that in the case at bar, and yet this court held the decree to be interlocutory, announcing the opinion the court had formed as to the rights of the parties and the principles of the decree it would finally render, leaving the entry of the final decree in form to be made when the amount due had been ascertained.

It is respectfully submitted that the appeal should be dismissed.

WM. F. MATTINGLY,
R. T. MERRICK,
Solicitors for Appellee.

FILED
OCT 23 1882
JAMES H. McKENNEY, CLERK

IN THE

Supreme Court of the United States.

No. 1086. October Term, 1882.

ALBERT GRANT, Appellant,

vs.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, Appellee.

Brief of B. H. WARNER, Receiver, on Rule on him to Show Cause why he should not be Attached for Contempt.

W. F. MATTINGLY,
R. T. MERRICK,
Of Counsel for Receiver.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term, 1882.

ALBERT GRANT, APPELLANT,

vs.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY, APPELLEE.

No. 1086.

BRIEF FOR B. H. WARNER, RECEIVER, ON RULE ON HIM TO SHOW CAUSE WHY HE SHOULD NOT BE ATTACHED FOR CONTEMPT.

DATES.

1882, March 2. Decree passed below.

" " 6. The defendant, Albert Grant, by his counsel, entered an order in the order-book in the clerk's office, directing the clerk to enter an appeal in behalf of said defendant, Albert Grant, from said decree of March 2, 1882, to the Supreme Court of the United States.

" " 9. Defendant Grant moved the court to fix the amount of a supersedeas bond, which motion the court denied, assigning as as reason therefor that *no appeal had been*

allowed, and that the decree was interlocutory.

1882, May 22. Bond of defendant Grant to operate as a supersedeas, approved by Justice Miller, of this court, and a citation issued to complainant signed by him.

It will thus be seen that more than sixty days, exclusive of Sundays, elapsed between the date of the decree, March 2, and the action of Justice Miller, May 22.

STATUTORY PROVISIONS.

Rev. St., Sec. 692.

An appeal shall be *allowed* to the Supreme Court from all final decrees of any Circuit Court * * * in cases in equity * * * .

Sec. 705.

The final * * * decree of the Supreme Court of the District of Columbia, where matter in dispute exceeds $2,500, may be re-examined * * * in the Supreme Court of the United States upon * * * appeal in the same manner and under the same regulations as are provided in * * * appeals from decrees rendered in a Circuit Court.

Sec. 1007.

In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error * * * within sixty days, Sundays exclusive, after the rendering of the judgment complained of and giving the security required by law on the issuing of the citation. "But if he desires to stay process on the judgment, he may, having served his writ of error as aforesaid, give the security required by law within sixty

days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a supersedeas, executions shall not issue until the expiration of said term of sixty days."

The receiver was justified in proceeding to discharge his duties as such under said decree of March 2, 1882, because—

I.

Said decree was interlocutory and not final, and was not the subject of an appeal and supersedeas. Upon this point see brief on motion to dismiss.

II.

The approval of the supersedeas bond and issuing of citation by Justice Miller was ineffectual and could not lawfully operate to supersede said decree. The statute gives no power to a justice of this court to approve a supersedeas bond after the expiration of the sixty days, *unless the defendant's appeal bond has been allowed within the sixty days.*

In this case the appeal had not only not been allowed, but the allowance had been refused.

The allowance of the appeal is essential, and when it is not allowed the remedy is by mandamus. The decisions of this court upon these matters are direct and emphatic.

3 Wall., 424, Barrel *v.* Transportation Co.

In this case, although the record showed a petition to the Circuit Court praying an appeal, the case was dismissed in this court because there was no allowance of the appeal.

23 How., 326, U. S. *v.* Gomez.

Appeal not allowed, this court will rescind decree docketing and dismissing the cause and recall the mandate.

3 Wall., 766, U. S. *v.* Gomez.

The court says: "Mandamus unquestionably is the proper remedy where the appeal is refused."

15 Wall., 384, ex parte Roberts.

In this case a mandamus was issued to the Court of Claims to hear a motion for a new trial, which it had refused for want of jurisdiction, because an appeal had been allowed, although subsequently revoked.

93 U. S., 86, Kitchen *v.* Randolph.

In this case the court says (p. 89) "the allowance of the appeal is the equivalent of the writ of error." The court, after fully discussing the statute and prior decisions, in conclusion says: "We are therefore of the opinion, that under the law as it now stands the service of a writ of error, or the perfection of an appeal within sixty days, Sundays exclusive, after the rendering of the judgment or the passing of the decree complained of, is an indispensable prerequisite to a supersedeas, and that it is not within the power of a justice or judge of the appellate court to grant a stay of process on the judgment or decree, if this has not been done."

93 U. S., 412, Sage *v.* Central R. R. Co.

"A supersedeas is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with. Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard.

"If a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement."

The court cannot give effect to a supersedeas by ordering that the appeal shall relate back to a time within the sixty days. "No supersedeas can follow from the appeal allow-

ed by Mr. Justice Miller, because that clearly took effect after the expiration of the sixty days from the date of the decree. Neither can the order of the same justice have the effect of the allowance of a supersedeas on the original appeal, because that appeal was not taken in time."

III.

A supersedeas granted after the receiver had entered upon the discharge of his duties could not prevent his continuing to hold the property, and it would be his duty to preserve it and to secure income from it.

19 Wall., 661, Commissioners *v.* Gorman,

Decides that a party removed from office under a decree, and subsequently a supersedeas bond filed, he cannot be restored.

94 U. S., Doyle *v.* Wisconsin.

Mandamus to revoke license to an insurance company, issued and executed; afterwards a supersedeas bond filed; motion to vacate denied.

IV.

The receiver is the officer of the court, appointed by the court in the interest of both parties, for the preservation of the property the subject-matter of the litigation. A thing that is frequently done pending an appeal; and no supersedeas of the decree therefor should affect his action in the proper discharge of his duties.

V.

It is apparent from the official records exhibited with the answer of the receiver that he acted solely under the in-

structions of the court as its officer, from the best of motives, without any disrespect for this honorable court, or in contempt of the action of Mr. Justice Miller.

Respectfully submitted,

W. F. MATTINGLY,
R. T. MERRICK,
Of Counsel for B. H. Warner, Receiver.

IN THE

Supreme Court of the United States.

ALBERT GRANT, Appellant,

vs.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, Appellee.

Answer of B. H. WARNER, Receiver, to Rule to Show Cause and parts of Record relating thereto, and also to the Motion to Dismiss the Appeal.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

ALBERT GRANT, APPELLANT,

vs.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY, APPELLEE.

Equity. No. 4291.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

The answer of Brainard H. Warner, receiver, to the rule to show cause why an attachment for contempt should not issue against him, passed by the Hon. Samuel F. Miller, associate justice of the Supreme Court of the United States, at chambers, on the 18th day of July, A. D. 1882.

This respondent, answering said rule to show cause, respectfully says as follows:

That he was appointed receiver in this cause by said decree, passed by the Supreme Court of the District of Columbia, in General Term, on March 2, 1882, a true copy of which is hereto attached, marked "Exhibit B. H. W. No. 1;" and that he duly qualified as such receiver under said decree.

This respondent was notified by said Albert Grant that he had taken an appeal from said decree to the Supreme Court of the United States, but was advised that said decree was not final, but merely interlocutory; that no appeal could be taken by said Albert Grant therefrom; and that said court

in General Term, on the application of said Grant therefor, had refused to allow an appeal and to fix the penalty of a supersedeas bond; and he files herewith, attached hereto, a true copy of the order passed by said court in General Term in the premises, marked "Exhibit B. H. W. No. 2."

That while proceeding in the discharge of his duties as such receiver he was served with a copy of the citation and approval of bond for appeal, signed by Justice Miller, a true copy of which is hereto annexed, marked "Exhibit B. H. W. No. 3."

That thereupon he reported said service upon him to said court in General Term, and prayed its instructions in the premises.

Said court, after argument upon the question as to whether said action of Justice Miller operated as a supersedeas of the powers and duties of said receiver under said decree of March 2d, decided that it did not. True copies of said report and the judgment of said court in General Term are hereto attached, marked respectively "Exhibit B. H. W. No. 4" and "Exhibit B. H. W. No. 5."

That when a copy of said rule to show cause was served upon him, he reported that fact to the Special Term of said Supreme Court of the District of Columbia, sitting in equity, (the court in General Term having adjourned,) for its instructions under the circumstances, whereupon said court, in Special Term, passed an order instructing this respondent to discontinue the exercise of his duties as such receiver. True copies of said report and of said order of court are attached hereto, marked respectively "Exhibit B. H. W. No. 6" and "Exhibit B. H. W. No. 7."

Upon the passage of said last mentioned order this respondent ceased to exercise his powers and duties as receiver in this cause, so notified the tenants of said property, and surrendered possession to said Albert Grant.

That while this respondent continued to discharge his duties as receiver, after notice of said approval of bond and issuing of citation by Mr. Justice Miller on May 22d, 1882, he did so in compliance with the instructions of the court which appointed him receiver, and in what he believed to be the requirement of his official duty as such receiver.

Throughout the whole matter he was actuated solely by a desire to impartially, faithfully, and fully discharge his duty as receiver, without the slightest desire or intention to

manifest either disrespect or contempt for your honorable court, or for Mr. Associate Justice Miller.

Whereupon this respondent denies that he has been guilty of contempt of your honorable court, and having responded fully to said rule, prays that the same may be discharged with costs.

All which is respectfully submitted to the honorable the Supreme Court of the United States.

BRAINARD H. WARNER.

Subscribed and sworn to before me this 10th day of October, A. D. 1882.

[SEAL.] JOHN W. SIMS,
Notary Public.

WM. F. MATTINGLY,
R. T. MERRICK,
Of Counsel.

Exhibit B. H. W. No. 1.

In the Supreme Court of the District of Columbia.

Phœnix Mutual Life Insurance Company } No. 4291.
vs. } Equity.
Albert Grant *et al.*

In General Term.

The cause came on to be heard upon the pleadings and proofs therein, and having been submitted by the counsel of the respective parties and duly considered by the court, and it appearing to the court that said defendant, Albert Grant, is not entitled to any relief under his cross-bill in this cause; that the plaintiff is the holder and owner of the several obligations of said Grant, secured by the deeds of trust on the real estate prayed in the original bill of complaint herein to be sold for the payment of the indebtedness thereon, and mentioned and set forth in the 3d, 4th, 5th, 6th, 7th, and 8th paragraphs of said bill; that said Grant has made default in the payment of his said obligations, on which he is indebted to the plaintiff in large sums of money, with long arrearages of interest; that said Grant has not paid taxes on said real estate for a number

of years, and the same are in arrears for upwards of twenty thousand dollars; that said indebtedness of said defendant Grant to the plaintiff largely exceeds the value of said real estate, and that the plaintiff has no personal security for its said debt; it is this second day of March, A. D. 1882, ordered, adjudged, and decreed that this cause be, and the same hereby is, referred to the auditor of the court to state the account between the plaintiff and the defendant Albert Grant; the amount due under said several deeds of trust on said real estate prayed to be sold in said bill; the amounts due said judgment and mechanic's lien creditors referred to in said bill; whether the same are liens upon any of said real estate; the relative priorities of the claims of said creditors and the plaintiff, and the value of the said real estate,—all from the proofs in this cause, except as to said mechanic's lien, and report the same to this court. And said auditor shall further ascertain and report to this court the amount due for taxes in arrears on said real estate, and whether the same or any part thereof has been sold for taxes, and if so, when, for what taxes, for what amount, and to whom.

It is hereby further ordered, adjudged, and decreed that Brainard H. Warner be, and he hereby is, appointed receiver in this cause. Said receiver is hereby authorized and directed forthwith to take and hold possession of the following real estate and premises described in the proceedings in this cause, to wit: Lots numbered one, (1,) three, (3,) four, (4,) five, (5,) six, (6,) eight, (8,) nine, (9,) ten, (10,) eleven, (11,) twelve, (12,) fourteen, (14,) and sixteen, (16,) in said square numbered seven hundred and sixty, (760;) to lease said property, or any part thereof, on such terms and for such time as he may deem for the best interest of the parties concerned, and to employ such agents and servants as may be necessary and proper.

It is hereby further ordered that said Albert Grant, and any and all persons holding possession of any part of said premises under said Grant, do deliver immediate possession of said real estate to said receiver; that said Albert Grant, his agents and employees, be, and they are hereby, enjoined from interfering in any way with said receiver in his possession and control of said property and every part thereof; that said receiver, before acting in the premises, do file with the clerk of the court in this cause his bond to

the United States in the penal sum of twenty-five thousand dollars, with one or more sureties, to be approved by the court, or one of the justices thereof, conditioned for the faithful performance and discharge of his duties as receiver in this cause.

The court reserves the right to extend the duties and powers of said receiver from time to time, if the same be deemed necessary; and leave is hereby granted to the receiver to apply to this court, or to the court in special term, for such instructions and orders as may be proper.

It is further ordered that said receiver report to this court, or to the court in special term, from time to time his actions in the premises.

By order of the court:

D. K. CARTTER,
Chief Justice.

A true copy.

[SEAL.] Test: R. J. MEIGS, Clerk.
By R. J. MEIGS, No. 3,
Assistant Clerk.

Exhibit B. H. W. No. 2.

In the Supreme Court of the District of Columbia.

In General Term, 9th March, '82.

Phœnix Mutual Life Insurance Co.
vs.
Albert Grant *et al.* } No. 4291.

Counsel having been heard by the court on the motion to have the penalty of an appeal and supersedeas bond fixed, and the court having duly considered the same, denies the same and refuses to fix the penalty of such bond, no appeal having been allowed from said decree, and the same being interlocutory only and designed to aid the court in passing a final decree at some day hereafter when the auditor's report comes in.

By order of the court:

D. K. CARTTER,
Ch. Just.

Exhibit B. H. W. No. 3.

DISTRICT OF COLUMBIA, *to wit:*

To the Phœnix Mutual Life Insurance Company: You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to the appeal filed in the clerk's office of the Supreme Court of the District of Columbia, wherein Albert Grant is appellant and you are respondent, to show cause, if any there be, why the decree in the said appeal mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness Samuel F. Miller, associate justice of the Supreme Court of the United States.

SAM. F. MILLER.

May 22, 1882.

Approval of Bond.

I approve the above bond to operate as a supersedeas, the application for the appeal having been made to the Supreme Court of the District of Columbia within sixty days from the rendition of the same.

SAM. F. MILLER,
Justice Sup. Court U. S.

May 22, 1882.

I certify that the above citation and approval of bond are correct copies of the original on file in this office, and that the bond referred to in the above approval and attached thereto is a supersedeas bond given by Benj. F. Butler, H. W. Blair, Emil S. Friedrich, John Fraser, and Robert E. Boston for the sum of $15,000.

[SEAL.] R. J. MEIGS, Clerk S. C. D. C.
By R. J. MEIGS, Jr., Asst. Clerk.

Exhibit B. H. W. No. 4.

In the Supreme Court of District of Columbia.

Phœnix Mutual Life Insurance Company } No. 4291.
vs. } Equity.
Albert Grant *et al.*

To the Justices of the Supreme Court of the District of Columbia in General Term:

Brainard H. Warner, receiver, respectfully reports that he has had served upon him by the United States marshal for this District the annexed copy of citation and approval of bond to operate as a supersedeas.

And he asks the instruction and direction of the court in the premises, and whether he is to retain possession and control of the property in his charge as receiver in this cause; and for such further instructions in the premises as may be proper.

BRAINARD H. WARNER,
Receiver.

Filed May 27th, 1882.

Exhibit B. H. W. No. 5.

In the Supreme Court of the District of Columbia. In General Term.

Phœnix Mutual Life Insurance Company } No. 4291.
vs. } Equity.
Albert Grant *et al.*

The request of the receiver in this cause for instructions filed herein on the 27th day of May, 1882, being called to the attention of the court, and the same being duly considered by the court, it is this 5th day of June, A. D. 1882, ordered that the receiver be, and he hereby is, instructed and directed to continue in performance and discharge of his duties as such under the decree passed herein on March 2d, 1882, subject to the further order or decree of the court.

By order of the court:

D. K. CARTTER,
Chief Justice.

Exhibit B. H. W. No. 6.

In the Supreme Court of the District of Columbia.

Phœnix Mutual Life Insurance Company } No. 4291.
vs. } Equity.
Albert Grant *et al.*

To the Court:

Your receiver, Brainard H. Warner, respectfully reports unto your honorable court that on the 21st day of July, 1882, there was served upon him by the marshal of the Supreme Court of the United States the annexed copy of a rule on him, issued by the Hon. Samuel F. Miller, associate justice of said court, to show cause in that court, on a day named in said rule, why an attachment should not issue against him for acting in disregard of the supersedeas of the decree of March 2, 1882, in this cause, granted on May 22, 1882; and your receiver respectfully prays for instructions in the premises.

BRAINARD H. WARNER,
Receiver.

Filed July 22, 1882.

Exhibit B. H. W. No. 7.

In the Supreme Court of the District of Columbia.

Phœnix Mutual Life Insurance Company } No. 4291.
vs. } Equity.
Albert Grant *et al.*

The rule against the defendant, Albert Grant, to show cause why he should not be punished for contempt, passed herein on the 17th day of July, A. D. 1882, having been duly served on said defendant, and it appearing from a further report of the receiver filed herein on July 22, 1882, that there has been served upon him a rule issued by Associate Justice Miller of the Supreme Court of the United States, to show cause why he should not be attached for contempt for continuing to exercise the powers of a receiver over the property mentioned in the proceedings herein in disregard of

the supersedeas of the decree of this court of March 2, 1882, granted May 22, 1882; and it now appearing to the court from said rule on the receiver that it was the intention of Justice Miller by said supersedeas order of May 22, 1882, to supersede the exercise by the receiver of his duties as such, it is, this 24th day of July, A. D. 1882, ordered that said rule against said defendant, Albert Grant, as well as previous proceedings for contempt, be, and the same hereby are, discharged. And the receiver is hereby instructed to discontinue the further discharge of his duties under said decree of March 2, 1882, and any subsequent order of the court.

A. B. HAGNER,
Associate Justice.

I certify that the foregoing five and one-half pages of paper writing are true copies of original papers now on file in the clerk's office of the Supreme Court of the District of Columbia. October 10, 1882.

Test: R. J. MEIGS, Clerk.
[SEAL.] By M. A. CLANCY, Asst. Clerk.
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16429

IN THE

Supreme Court of the U. S.

OCTOBER TERM, 1882.

ALBERT GRANT, *Appellant*,

vs. No. 1086.

PHŒNIX MUT. LIFE INS. CO., *Appellee*.

Motion of Appellant for the recall of Mandate to the Supreme Court of the District of Columbia, and affidavits.

WILLIAM A. MELOY,
H. W. BLAIR.
of Counsel for Appellant.

IN THE

Supreme Court of the U. S.

OCTOBER TERM, 1882.

ALBERT GRANT, *Appellant*,

vs. No. 1086.

PHŒNIX MUT. LIFE INS. CO., *Appellee*.

Now comes the said appellant and moves the court, by his counsel, to recall the mandate issued by order of January 3, 1883, for the reason given in the affidavit of the appellant filed with this motion.

WILLIAM A. MELOY,
H. W. BLAIR.
of Counsel for Appellant.

DISTRICT OF COLUMBIA. } *ss.*

Albert Grant first being duly sworn deposes and says:

That he is the defendant in the cause mentioned in the motion herewith.

That the following order was made in the Supreme Court of the United States, on or about the 3rd day of January, 1883:

OCTOBER TERM, 1882.

No. 1086.

ALBERT GRANT, *Appellant*.

vs.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY.

"On motion of Mr. W. F. Mattingly, of counsel for the appellee, leave is hereby granted the clerk to issue the mandate in this cause. 3rd January, 1883."

Whereupon the clerk did issue to the said counsel the mandate of this court remanding said cause to the Supreme Court of the District of Columbia.

That affiant is informed and believes that by the practice of the Supreme Court of the United States no mandate or procedendo issues in any case during the term in which the judgment is rendered, unless on special order of the court, made on motion. That by the 6th Rule of said Supreme Court all motions must be reduced to writing, and must contain a brief statement of the facts and objects of the motion. That no motion to issue said mandate by special order, appears on record in the clerk's office, nor as affiant is informed and believes was said motion ever reduced to writing. That no notice of any such motion was given to appellant or to his counsel, and so no opportunity was allowed appellant's counsel to argue the motion or call the attention of the court to the material and sufficient reasons which existed, why the mandate or procedendo to the court below should not yet have been issued, as provided for in Rule 6. That the practice of the court, unless by special order passed on motion with notice, and with opportunity for argument as aforesaid, is that the mandate shall be issued only after the adjournment of the term in which the judgment is rendered.

That being desirous and intending to prepare for the presentation of certain petitions to be filed in the cause before the Supreme Court of the United States for restoration and correction of the record in the court below, notice of which petition had been on several occasions by various motions and proceedings given to the Supreme

Court of the United States, and especially desiring to secure the attendance and personal attention of his principal counsel, Hon. Benj. F. Butler, before this court on the proceedings referred to, affiant applied at the clerk's office of said court to ascertain when the mandate remanding the cause to the Supreme Court of the District of Columbia would be issued, in order that affiant might communicate with his said senior counsel, Hon. Benj. F. Butler, in regard to the presentation of the petition referred to, and argument thereon the filing of said petitions having been by his advice deferred until the decision of the court in the matter of the motion to dismiss said appeal. That affiant was informed at said clerk's office by the clerk that the mandate would not be sent down earlier than February, 1883, unless a special orderwas made with notice. That affiant was adised by counsel that said motion and notice were necessary and that there would be time for the presentation of the petition referred to after full preparation and consultation with his before named counsel, and affiant at once notified said senior counsel of the fact of which the rules, the statements of the clerk of the court, and the advice of his local counsel all assured him.

The *mandamus* on the Judges of the Supreme Court of the District of Columbia, commanding them to correct the record improperly altered in this cause, by the addition by the clerk of the words "without prejudice seven years after its passage, and in another cause the final decree in which was pleaded by appellant as a bar in this cause, the effect of said improper alteration being to deprive affiant of his just plea of *res judicata*: 2. to compel the hearing of said plea in bar, which hearing had been unjustly refused by said judges. 3 and 4. to compel said judges to proceed to a final decree at

stages in the cause where the case was ripe for judgment, and 5, that certain extra judicial and improper proceedings should be stricken from the record including the decree of March 2, 1882, appointing the receiver.

The said petitions will show as affiant verily believes delays and denials of justice by the court below in favor of the appellee and against the affiant; that the cause has been kept in a long and tedious litigation to the great damage of the property and to the great injury of the affiant; and the haste of the appellee in procuring the mandate before the usual time, and on *ex parte* application is due as affiant believes to the desire to get possession of the property as soon as possible in the hands of the receiver, notwithstanding the destruction of the rental value of the property consequent thereon, as shown by experience and the fact that ample and sufficient security has been given for all rents, profits, damages, and costs, and in fact to forestall the result which the affiant hopes to obtain from action of this court upon his petition aforesaid.

Affiant says that his motion for recall of mandate is not interposed for delays but to enable him to prepare for presenting to the court the matters aforesaid in the interests of justice, and because the relief asked for in his said petitions and motions is as he verily believes essential to the proper adjudication of this cause and to its speedy termination by a final decree made after the record has been restored and purged as prayed for.

And because as he is advised by counsel and fears may be the case, the sending down of said mandate and restoring to the court below full and unimpaired jurisdiction in the premises both as to the conduct of said cause, and the transferring of possession and control of the

property involved, to the hands of its receiver will both embarass and hinder your petitioner in obtaining his just and lawful rights, depreciate the rental value of said property, and prevent him from obtaining the protection in his rights due him under the law, should this honorable court eventually sustain him in such mandamus proceedings.

Affiant further saith that proceedings are now pending before this court, whereby the receiver appointed by the Supreme Court of the District of Columbia, in said cause is required to show cause before this court why he should not be punished for contempt in violating its susedas and affiant fully intends to bring the said matter to final hearing at the same time with his several applications for mandamus aforesaid, and at the earliest day on which his said principal counsel can attend this honorable court; and further, affiant saith not.

ALBERT GRANT.

Albert Grant, having heard and read the foregoing petition on oath, says that the foregoing statements contained as of his own knowledge are true, and those on information and belief, he believes to be true.

ALBERT GRANT.

Sworn to and subscribed before me, this 15th day of January, 1883.

R. J. MEIGS,
Clerk Supreme Court D. C.

16429

16429

Supreme Court of the U. S.

OCTOBER TERM, 1882.

No. 1086.

ALBERT GRANT, Appellant,

vs.

THE PHOENIX MUTUAL LIFE INSURANCE COMPANY, Appellee.

Appellants Brief upon Motion to dismiss, Appeal filed November 20th, 1882, p. 1
Amended Brief filed December 11th, 1882. " 9
Decree and Opinion of the Supreme Court of the District of Columbia of March 2d, 1882. Filed December 11th, 1882. p. 10

WM. A. MELOY,
BENJ. F. BUTLER,
of Counsel for Appellant.

Supreme Court of the U. S.

No. 1,086. October Term, 1882.

Albert Grant,
Appellant,

vs.

The Phœnix Mutual Life Ins. Co.
Respondent.

Brief for Appellant Upon Motion to Dismiss His Appeal.

The bill in this case was filed by the Phœnix Mutual Life Insurance Company for the foreclosure of several deeds of trust upon the property known as "Grant's Row," on East Capitol street, in the city of Washington, and for the sale of the property to pay the indebtedness secured thereby.

The defendant, Grant, plead in bar a former decision of the Supreme Court of the District of Columbia, as *res adjudicata*.

And also filed a cross-bill setting up a contract between himself and said Insurance Company discharging all the debts secured by the deeds of trust, and he prayed that all such deeds should be cancelled and evidence of indebtedness surrendered.

On the 2d of March, 1882, upon consideration of the pleadings and evidence on both sides, the court below passed the decree from which Grant took the appeal in question.

We maintain the finality of the decree and the full jurisdiction of this court to entertain the appeal.

The main and all comprehending question presented by the original bill, was the right of the Insurance Company to have foreclosure of the deeds of trust for the payment of Grant's notes.

The question presented by Grant's plea was, whether the Insurance Company was estopped to maintain their suit; and by his cross-bill was, whether the Company had not contracted to release the deeds of trust, and surrender the notes secured.

The decree of the court, after stating that the cause came on to be heard upon the pleading and proofs and had been submitted, and duly considered, proceeds to find and declare:—

That Grant was not entitled to any relief under his cross-bill.

That the Insurance Company was the owner and holder of Grant's obligations secured by said deeds of trust upon said property, prayed in the original bill to be sold for the payment thereof.

That Grant had made default in payment of said obligations and indebtedness.

That said indebtedness of Grant to the plaintiff largely exceeded the value of the said real estate, and the plaintiff company, had no personal security for such indebtedness, and accordingly appointed a receiver to forth-

with take and hold possession of the property, and required Grant to deliver immediate possession to the receiver.

In the light of the issues presented for determination, we may well ask what could have been more final? What more conclusive of all the rights of the parties than the disposition thus made of them by the court below?

In fact nothing remains for that court to do but to distribute the proceeds of the sale of property between the Insurance Company and certain judgment creditors as their priority of right should appear.

This, however, is entirely a subordinate and secondary matter not involved in the merits of any of the issues between the plainti ff Insurance Company, and Grant.

It is that minor detail of post decretal business which the Supreme Court of the District of Columbia commonly postpones until the money is actually in the registry of the court.

The decree leaves no material thing at issue between Grant and the Company to be litigated or considered. Every right or equity claimed by him in plea or in cross bill is cut down and finally extirpated, and the property taken from him—not for preservation, not that Grant may possibly share in the usufruct, but because the court has determined all his rights in or to it, and for the benefit of the Company and the immediate payment of the obligations adjudged to be theirs, just as when a mortgagee takes possession by virtue of his title formed. These were the things the parties respectively called the court to adjudicate upon, and the court has adjudicated every issue, concluded the matter submitted to them —

disposed of the whole question raised by the pleadings.

But the statute guarantees us the right of appeal to this Honorable Court from a "final decree." And is this not "final?" To ascertain the jurisdictional power and correlative duty of this court to entertain an appeal, we must inquire what the law-maker meant by the word "final."

And first the lexicographers say it means "Relating to the end"—"Conclusive"—"Decisive." But in a suit, end of what? Conclusive of what? Necessarily, of the questions presented for adjudication—of the issues raised If then a decree is the end of the questions presented by the pleadings of the parties—if it is conclusive of the issues raised, it is final and appealable.

Blackstone says, a judgment which declares that a plaintiff has entitled himself, or has not entitled himself to recover the remedy he sues for, is a final judgment. (v. 3, Bl. Com. 398.)

Bouvier says, a final decree is one which finally disposes of the whole question.

So by lexicon or by law-book, we have at bar just what the law-makers intended by "final decree."

The decisions of this court heretofore made upon cases raising this point, have never given a limitation of its jurisdiction by arbitrary statement of what shall be earmarks to determine the final decree. They are but the application of the definitions we have cited to each case as it arose, and we believe they maintain our position.

In French v. Shoemaker, 12 Wal. 86, the court maintaining its jurisdiction, appears to place it upon the ground thus stated in the opinion: "Unquestionably the whole law of the case before the court was settled by

the chief justice in that decree." "The decree is a final one, *as it has conclusively settled all the legal rights of the parties involved in the pleadings.*"

In Whiting v. Bank of U. S., 13, Pet. 15, the court sustained its jurisdiction of the appeal "upon the ground that the decree was final upon the merits, and the ulterior proceedings but a mode of executing the original decree."

So said the unanimous court by the mouth of Judge Story.

And in Forgary v. Conrad, (6 How. 204) the court said again in the words of Chief Justice Taney, "When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one, and authorizes an appeal to this court."

Now in the case at bar, the court has decided the defendant's right to the property in contest (with every other right he claimed in the suit) and directed it to be delivered "forthwith" by the defendant to the—complainant, we venture to assert, for we make bold to say that the designation of a receiver is but a device to secure practically the immediate possession and usufruct to the complainant. It is impossible that any other purpose could exist when the court decrees the validity of the mortgage encumbrance, the complainant's ownership of the debt secured thereby upon the property, and that such indebtedness of the defendant to the complainant is largely greater than the entire value of the property.

After this, what remains of the material rights of either party undecided? Is not all still to be done, or

that may be done by the court below, strictly in the ulterior path of executing—carrying out—effectuating the rights declared by this decree, and the remedies which the law *ex proprio vigore* attaches thereto?

In Withenburg v. U. S. 5. Wal., 821, Chief Justice Chase said, "The decree disposed of the whole matter in controversy upon the claim of Withenburg v. Doyle. It was final as to them and their rights. It left nothing to be litigated between the parties."

In 10 Wal., 587, Stowal v. Banks, the Court says: It is not unusual in Courts of Equity to enter decrees determining the rights of one party to the other, giving at the same time a right to apply to the court for modification and direction. It has never been doubted that such decrees are final.

See also

Bibb v. Russell, 19 How., 258;
Thomas v. Dean, 7 Wal., 340;
1 Black, 54;
2 " 524.

It might perhaps be said of the decree in the case at bar that it was drawn with little intelligent regard for the suggestion of the court in Forgary vs. Conrad; that in short it was defective, but certainly not that it is not in its nature final, *i.e.*, conclusive of the equities of the parties. Judge Hughes, of the Virginia Circuit, very aptly drew the distinction in Scott vs. Hore, 1 1 Hughes, 163. He said:

"If decrees made after full and final argument, and which determine all questions raised do not go on to provide for carrying into complete execution the principles decided, they are in that *defective, but none the less final* decrees and appealable."

The case at bar radically differs from that of the R. R. Co. vs. Swasey in two material points. In the latter the property to be sold was not ascertained, nor was the amount of indebtedness determined. In this, all the property is ascertained and the indebtedness determined as more than the possible value of the property. No question is reserved but the purely subordinate and episodical one as to the distribution of the funds about about which Grant cares nothing, nor could ever need to appeal.

The case of Perkins v. Fourniquet, cited by appellee was that of a suit for partition of property and accounts of rents and profits, in which no partition had been made.

In Pulliam v. Christian, the court below had not determined the question how far the trustees were liable to Christian for proceeds of the property received by them, and as no change of property was ordered and the decree was final as to only one branch of the litigation, the appeal was dismissed.

In Barnard v. Gibson the court calls attention to the fact that while one branch of relief sought by the pleadings was passed upon and granted, that sounding in damages was not passed upon.

The case of Craighead v. Wilson was also a partition case, and no issue appears to have been raised except upon the accounting for rents and profits. Before reaching this point an appeal was taken, and the court declined to entertain it because the decree was not "final in all matters within the pleadings," 18 How., 201.

So in the Palmyra case it was the fact that the question of damages remained undisposed of, which led the court to reject jurisdiction.

A glance over the record, and a consideration of its peculiar features, would do much to persuade the court that this decree was not merely a device, but one ingeniously contrived in the interest of a prolonged litigation to enable the complainant company to get possession of the rents and profits of the property, and at the same time prevent Grant from submitting his equities to the judgment of this impartial tribunal with the benefits of a supersedeas, though ever so ready and able to indemnify the insurance company from all loss.

The device was a failure as it certainly ought to be.

Very respectfully submitted,

WILLIAM A. MELOY,

of Counsel for Appellant.

Upon a re-examination of this brief there seems to be a single consideration only which might be added. It is submitted that the distinction which runs through the cases is this:

Where the decree leaves nothing further to be litigated between the parties, the decision upon which could be the subject of appeal, then the decree is final. Where any material disputable question between the parties is left open, the decision of which might of itself be the subject of an appeal, then the decision is not final.

To apply this; it is admitted by the appellee's brief that if the property had been ordered to be sold the decree would have been final. But if the judgment of the Court stands, what question can be raised as to the propriety of an order of sale in which Grant can have any interest, as the decree finds that the amount of debts and liens far exceeds the value of the property.

Respectfully submitted,

BENJ F. BUTLER,

Of Counsel for Appellant.

Dec. 7th, 1882.

IN THE

Supreme Court of the Dist. of Col.

In General Term.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY
vs.
ALBERT GRANT, *et al.*

No. 4291. Equity.

Decree of March 2d, 1882, settling the Equities between the parties, and appointing a Receiver, and referring the cause to the Auditor to state the account between the Plaintiff and the Defendant ALBERT GRANT.

Decree of March 2d, page 1.
Opinion of the Court, by Justice James, page 4.

IN THE

Supreme Court of the Dist. of Col.

PHŒNIX MUTUAL LIFE INSURANCE COMPANY
vs.
ALBERT GRANT, *et al.*

No. 4291. Equity.

In General Term.

The cause came on to be heard upon the pleadings and proofs therein, and having been submitted by the counsel of the respective parties, and duly considered by the Court, and it appearing to the Court that said defendant, Albert Grant, is not entitled to any relief under his cross-bill in this cause; that the plaintiff is the holder and owner of the several obligations of said Grant, secured by the deeds of trust on the real estate prayed in the original bill of complaint herein to be sold for the payment of the indebtedness thereon, and mentioned and set forth in the 3d, 4th, 5th, 6th, 7th & 8th paragraphs of said bill; that said Grant has made default in the payment of his said obligations, on which he is indebted to the plaintiff in large sums of money, with long arrearges

of interest; that said Grant has not paid the taxes on said real estate for a number of years, and the same are in arrears for upwards of twenty thousand dollars; that said indebtedness of said defendan Gtrant to the plaintiff largely exceeds the value of said real estate, and that the plaintiff has no personal security for its said debt; it is this second day of March, A. D. 1882, ordered, adjudged, and decreed that this cause be, and the same hereby is referred to the auditor of the court to state the account between the plaintiff and the defendant Albert Grant; the amount due under said several deeds of trust on said real estate prayed to be sold in said bill; the amounts due said judgment and mechanic's lien creditors referred to in said bill; whether the same are liens upon any of said real estate; the relative priorities of the claims of said creditors and the plaintiff, and the value of the said real estate, all from the proofs in this cause, except as to said mechanic's lien, and report the same to this court, and said Auditor shall further ascertain and report to this court the amount of taxes in arrears on said real estate, and whether the same or any part thereof has been sold for taxes, and if so, when, for what taxes, for what amount, and to whom.

It is hereby further ordered, adjudged, and decreed that Brainard H. Warner, be and he hereby is appointed receiver in this cause, said receiver is hereby authorized and directed forthwith to take and hold possession of the following real estate and premises described in the proceedings in this cause, to wit, said lots numbered one (1,) three (3,) four (3,) five (5,) six (6,) eight (8,) nine (9,) ten (10,) eleven (11,) twelve (12,) fourteen (14,) and sixteen (16,) in said square numbered seven hundred and sixty (760,) to lease said property, or any

part thereof, on such terms and for such time as he may deem best for the interest of the parties concerned, and to employ such agents and servants as may be necessary and proper.

It is hereby further ordered that said Albert Grant, and any and all persons holding possession of any part of said premises under said Grant, do deliver immediate possession of said real estate to said receiver: that said Albert Grant, his agents and employees, be, and they are hereby enjoined from interferring in any way with said receiver in his possession and control of said property and every part thereof: that said receiver, before acting in the premises, do file with the clerk of the court in this cause, his bond to the United States in the penal sum of twenty-five thousand dollars, with one or more sureties, to be approved by the court, or one of the Justices thereof, conditioned for the faithful performance and discharge of his duties as receiver in this cause

The Court reserves the right to extend the duties and powers of said receiver from time to time, if the same be deemed necessary; and leave is hereby granted to the receiver to apply to the court, or to this court in Special Term, for such instructions and orders as may be proper.

It is further ordered that said receiver report to this court, or to the court in Special Term, from time to time his actions in the premises.

By order of the Court.

D. K. CARTTER,
Chief Justice.

A True Copy.

[SEAL.] Test.

R. J. MEIGS, *Clerk.*

By R. J. MEIGS, *Ass't Clerk.*

Filed March 2, 1982.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

THE PHŒNIX INS. CO. vs. ALBERT GRANT. } Opinion of Justice James.

I am instructed by the court to announce its conclusion of the questions submitted at the last hearing of the case of the Phoenix Company against Grant.

A decree was submitted to the Court, not by consent, as we perfectly understood, but representing the views of both sides as to the status of the case under our ruling. Consent was given just so far as to make no objection to the representation of the conclusions themselves, merely as we understand the approval of the form in which the Court states what it has decided, and it was then understood that the Court was of the opinion that these deeds of trust were in full force that no defense stood in the way by reason of the record, and with a large indebtedness, the original indebtedness still subsisting, but just how much it is we are unable to state until it shall have gone to the auditor. The only question discussed by counsel was the propriety of appointing a receiver.

Our attention was called to the fact that a receiver had been appointed in an early stage of this case, and after he had possession of the property for some years, I think three years, the order was revoked and the property was taken out of the hands of the receiver. Upon that question the judges *seriatim* gave their opinion, and two of them were of the opinion that at that stage of the case it was improper to appoint a receiver. The debt was denied. The very liability was then contested.

The Court were unable at that point to decide that the debt did exist until they should have looked into what we conceive to be their original records. But it was said on the other side that it did not follow that a receiver could not be asked for now, did not follow that the opinion of the Court as delivered then, and the reasons given showed that it was improper at the present time to grant a receiver. We have looked at that opinion, and are of the opinion that it dealt with the status of the case as it then existed, and that the question must be considered whether its present status involves the same considerations.

Now, it is found by the Court in such order as we propose to grant, without reference I mean to a receiver, that the indebtedness exists, that the deeds of trust exist, that the liability under those deeds of trust is complete. What does the law permit; what does the law require in that state of the case, if the facts are shown suggesting the propriety of a receiver. It is said that the property has been well taken care of, that no waste has occurred, that there is no reason on that ground to appoint a receiver, and we so think. We have no doubt at all that Mr. Grant has applied the rents and profits of these houses in such a way as to improve their value so far probably as those rents would go. That he has used a portion of that income for his own support we can hardly regard it more than as a compensation for somebody to take care of the property. We could not say it should not go there. The party must have something for his family to live on. Somebody would have to receive the rents. We do not therefore attach any importance to that, that some portion of those receipts have gone to the support of Mr. Grant, and we do think

that he took care of the property so as to improve it and enhance its value. We think that may be said to be out of the way. But our attention is called to the relation of its value to the debt, and to the fact that the taxes have been for some years allowed to run in arrears. Although we are unable to state the precise amount of this debt, we have *prima facie* evidence which enable us to know that it is large, and we have on the other hand evidence in this testimony which satisfies us that the property is not sufficient at this day with such improvements as the holder has put upon them to pay the debt.

Mr. Grant himself was of the opinion, as expressed in a letter of the 14th of December, 1878, that the property was not worth, when it came back in his hands, over one hundred thousand dollars. Some fifteen thousand or more of income has been spent upon improvements and restoring the property since that time, and its value with that addition may be estimated. We are clearly of opinion that at this moment it is insufficient to pay the charges upon it. Then as to the taxes. It is not contested that those are in arrears. We are informed that some of them are in litigation, but the taxes amount to a very considerable sum, and they are an accumulation of a number of years. What then are the powers and what is the duty of a Court of Equity in such a case?

It is no longer under the order that we make the question whether the debt exists. We find that it does. We find that it is due. That there is a default. That is not the case of a contested debt as it now presents itself to the Court. It is the case of a default. At all times during the pendency of an equity suit it is com-

petent to apply for a receiver. To grant one may be proper at one stage, and become proper at a subsequent stage. It may be proper when the debt is in doubt, and doubtless would so be treated ordinarily. It may be entirely proper when the debt, I will not say is ascertained, but is found to exist to a certain amount at least. We were told that in mortgage cases courts had refused to disturb the mortgagor, and that therefore it seems to be argued that it would be clearly improper to disturb the creditor in a deed of trust. Now, as to mortgage cases we find that when the debt is found to exist Courts of Equity have appointed receivers on the application of the legal mortgagee, I mean the first mortgagee of the legal title. It has not been infrequent for them to appoint a receiver at the instance of a mortgagee who took no lien upon the equity. But I find that it has been done over and over again in the case of a legal mortgagee, where there is danger that the property itself would be wasted, where the security is not large, and that has not been at all on the ground that the mortgagee was mortgagee of the rents and profits, but on the ground that when his debt became due he had a right to the possession, and then had a right to the rents and profits. It was not deemed necessary mortgagee's right of possession should carry them, but quite sufficient that the mortgagor gave to the mortgagee the right upon the enjoyment of which he would come into reception of the rents and profits. Ordinarily a receiver has been refused on application of a legal mortgagee on the ground that he had a remedy at law. The English cases were strict on that subject, and as Chief Justice Cranch says, in the 4th of Cranch, no instance in the English cases nor in the American cases which had been decided upon the authority of an English case had been

shown him for the appointment of a receiver in such a case, and the judge thought that no such case had been shown to him. But I observe that the learned Chief Justice took pains to go on to say that the mortgagee had not shown reasonable diligence, that the mortgage had been maturing for several years, more than three years, and he had lain by and suffered accumulation of interest, and then when he asked for the appointment of a receiver on the ground of accumulation of interest, which he himself had permitted, the Court said he had not shown reasonable diligence, and was not entitled to it.

FILED
NOV 20 1882
JAMES H. McKENNEY, Clerk

Supreme Court of the U. S.

No. 1,086. October Term, 1882.

Albert Grant,
Appellant,

vs.

The Phœnix Mutual Life Ins. Co.
Respondent.

Brief for Appellant Upon Motion to Dismiss His Appeal.

The bill in this case was filed by the Phœnix Mutual Life Insurance Company for the foreclosure of several deeds of trust upon the property known as "Grant's Row," on East Capitol street, in the city of Washington, and for the sale of the property to pay the indebtedness secured thereby.

The defendant, Grant, plead in bar a former decision of the Supreme Court of the District of Columbia, as *res adjudicata*.

And also filed a cross-bill setting up a contract between himself and said Insurance Company discharging all the debts secured by the deeds of trust, and he prayed that all such deeds should be cancelled and evidence of indebtedness surrendered.

On the 2d of March, 1882, upon consideration of the pleadings and evidence on both sides, the court below passed the decree from which Grant took the appeal in question.

We maintain the finality of the decree and the full jurisdiction of this court to entertain the appeal.

The main and all comprehending question presented by the original bill, was the right of the Insurance Company to have foreclosure of the deeds of trust for the payment of Grant's notes.

The question presented by Grant's plea was, whether the Insurance Company was estopped to maintain their suit; and by his cross-bill was, whether the Company had not contracted to release the deeds of trust, and surrender the notes secured.

The decree of the court, after stating that the cause came on to be heard upon the pleading and proofs and had been submitted, and duly considered, proceeds to find and declare:—

That Grant was not entitled to any relief under his cross-bill.

That the Insurance Company was the owner and holder of Grant's obligations secured by said deeds of trust upon said property, prayed in the original bill to be sold for the payment thereof.

That Grant had made default in payment of said obligations and indebtedness.

That said indebtedness of Grant to the plaintiff largely exceeded the value of the said real estate, and the plaintiff company had no personal security for such indebtedness, and accordingly appointed a receiver to forth-

with take and hold possession of the property, and required Grant to deliver immediate possession to the receiver.

In the light of the issues presented for determination, we may well ask what could have been more final? What more conclusive of all the rights of the parties than the disposition thus made of them by the court below?

In fact nothing remains for that court to do but to distribute the proceeds of the sale of property between the Insurance Company and certain judgment creditors as their priority of right should appear.

This, however, is entirely a subordinate and secondary matter not involved in the merits of any of the issues between the plaintiff Insurance Company, and Grant.

It is that minor detail of post decretal business which the Supreme Court of the District of Columbia commonly postpones until the money is actually in the registry of the court.

The decree leaves no material thing at issue between Grant and the Company to be litigated or considered. Every right or equity claimed by him in plea or in cross bill is cut down and finally extirpated, and the property taken from him—not for preservation, not that Grant may possibly share in the usufruct, but because the court has determined all his rights in or to it, and for the benefit of the Company and the immediate payment of the obligations adjudged to be theirs, just as when a mortgagee takes possession by virtue of his title formed. These were the things the parties respectively called the court to adjudicate upon, and the court has adjudicated every issue, concluded the matter submitted to them —

disposed of the whole question raised by the pleadings.

But the statute guarantees us the right of appeal to this Honorable Court from a "final decree." And is this not "final?" To ascertain the jurisdictional power and correlative duty of this court to entertain an appeal, we must inquire what the law-maker meant by the word "final."

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In French v. Shoemaker, 12 Wal. 86, the court maintaining its jurisdiction, appears to place it upon the ground thus stated in the opinion: "Unquestionably the whole law of the case before the court was settled by

the chief justice in that decree." "The decree is a final one, *as it has conclusively settled all the legal rights of the parties involved in the pleadings.*"

In Whiting v. Bank of U. S., 13, Pet. 15, the court sustained its jurisdiction of the appeal "upon the ground that the decree was final upon the merits, and the ulterior proceedings but a mode of executing the original decree."

So said the unanimous court by the mouth of Judge Story.

And in Forgary v. Conrad, (6 How. 294) the court said again in the words of Chief Justice Taney, "When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one, and authorizes an appeal to this court."

Now in the case at bar, the court has decided the defendant's right to the property in contest (with every other right he claimed in the suit) and directed it to be delivered "forthwith" by the defendant to the—complainant, we venture to assert, for we make bold to say that the designation of a receiver is but a device to secure practically the immediate possession and usufruct to the complainant. It is impossible that any other purpose could exist when the court decrees the validity of the mortgage encumbrance, the complainant's ownership of the debt secured thereby upon the property, and that such indebtedness of the defendant to the complainant is largely greater than the entire value of the property.

After this, what remains of the material rights of either party undecided? Is not all still to be done, or

that may be done by the court below, strictly in the ulterior path of executing—carrying out—effectuating the rights declared by this decree, and the remedies which the law *ex proprio vigore* attaches thereto ?

In Withenburg v. U. S. 5. Wal., 821, Chief Justice Chase said, "The decree disposed of the whole matter in controversy upon the claim of Withenburg v. Doyle. It was final as to them and their rights. It left nothing to be litigated between the parties."

In 10 Wal., 587, Stowal v. Banks, the Court says: It is not unusual in Courts of Equity to enter decrees determining the rights of one party to the other, giving at the same time a right to apply to the court for modification and direction. It has never been doubted that such decrees are final.

See also

Bibb v. Russell, 19 How., 258;
Thomas v. Dean, 7 Wal., 340;
1 Black, 54;
2 " 524.

It might perhaps be said of the decree in the case at bar that it was drawn with little intelligent regard for the suggestion of the court in Forgay vs. Conrad; that in short it was defective, but certainly not that it is not in its nature final, *i.e.*, conclusive of the equities of the parties. Judge Hughes, of the Virginia Circuit, very aptly drew the distinction in Scott vs. Hore, 1 1 Hughes, 163. He said:

"If decrees made after full and final argument, and which determine all questions raised do not go on to provide for carrying into complete execution the principles decided, they are in that *defective, but none the less final* decrees and appealable."

The case at bar radically differs from that of the R. R. Co. vs. Swasey in two material points. In the latter the property to be sold was not ascertained, nor was the amount of indebtedness determined. In this, all the property is ascertained and the indebtedness determined as more than the possible value of the property. No question is reserved but the purely subordinate and episodical one as to the distribution of the funds about about which Grant cares nothing, nor could ever need to appeal.

The case of Perkins v. Fourniquet, cited by appellee was that of a suit for partition of property and accounts of rents and profits, in which no partition had been made.

In Pulliam v. Christian, the court below had not determined the question how far the trustees were liable to Christian for proceeds of the property received by them, and as no change of property was ordered and the decree was final as to only one branch of the litigation, the appeal was dismissed.

In Barnard v. Gibson the court calls attention to the fact that while one branch of relief sought by the pleadings was passed upon and granted, that sounding in damages was not passed upon.

The case of Craighead v. Wilson was also a partition case, and no issue appears to have been raised except upon the accounting for rents and profits. Before reaching this point an appeal was taken, and the court declined to entertain it because the decree was not "final in all matters within the pleadings," 18 How., 201.

So in the Palmyra case it was the fact that the question of damages remained undisposed of, which led the court to reject jurisdiction.